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OAG 17-016

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Subject: Whether school system positions requiring a professional level of education are exempt from Social Security participation as participants in the Kentucky Teachers' Retirement System

Requested by: J.W. Bryan
State Social Security Administrator

Written by: Matt James

Syllabus: School system positions requiring a professional level of education have historically participated in the Kentucky Teachers' Retirement System, and are therefore excluded from Social Security participation

Statutes construed: 42 U.S.C. § 418; KRS 161.220

OAGs cited: OAG 85-133, OAG 69-355, OAG 67-232, OAG 66-747, OAG 65-629

Opinion of the Attorney General

J.W. Bryan, State Social Security Administrator, has requested an opinion of this office, which was requested by the Social Security Administration ("SSA") and Internal Revenue Service ("IRS"), concerning the inclusion of positions requiring a professional level of education in the Kentucky Teachers' Retirement System ("KTRS"), which exempts those positions from Social Security participation. We advise that that various school system positions requiring a professional level of education have historically been included in KTRS, and are therefore exempt from Social Security participation.

Background

A. The Social Security Act and Section 218 Agreements

Section 218 of the Social Security Act, codified at 42 U.S.C. § 418, authorizes states to enter into an agreement with the Social Security Administration to provide social security benefits to state or local employees. *Id.* § 418(a)(1). Such agreements are referred to as "Section 218 Agreements." A state may request to exclude from its Section 218 Agreement "all services performed by individuals as members of a coverage group in positions covered by a retirement system on the date such agreement is made applicable to such coverage group." *Id.* § 418(c)(3)(B). A retirement system is defined as "a pension, annuity, retirement, or similar fund or system established by a State or by a political subdivision thereof." *Id.* § 418(b)(4). In a Section 218 Agreement, a state may thus exempt a group already covered by a state or local government pension plan from participation in social security. Kentucky entered into a Section 218 Agreement with the Social Security Administration on April 27, 1951, and opted to exempt those state employees already covered by a retirement system. "State law is applied in determining when a position is under a retirement system and which employees are eligible for membership in a retirement system." SSR 74-5, 1960-1974 Soc. Sec. Rep. Serv. 999 (1974).

B. History and Interpretations of the Definition of "Professional Staff" in the Teachers' Retirement System Statutes

At the time of Kentucky's Section 218 Agreement, KRS 161.220(1) provided that "'retirement system' means the arrangement provided for in KRS 161.230 to 161.710 for payment of allowances to teachers." KRS 161.220(4) defined "teacher" as:

- (a) Any full-time regular or special teacher, principal, supervisor, superintendent, librarian, director of pupil personnel, or other full-time member of the teaching or professional staff engaged in the service of the public elementary and secondary schools, for whom certification is required by the State Department of Education as a condition of employment;

....

- (c) The Superintendent of Public Instruction and the division heads and other professional staff members of the State Department of Education appointed in accordance with KRS 156.140

KRS 161.220(4) was amended in 1962 to strike "appointed in accordance with KRS 156.140" from KRS 161.220(4)(c), which was a necessary response to the repeal of KRS 156.140 as part of the state merit system act. A new section was added to include "such members of the administrative staff of the Teachers' Retirement System of the State of Kentucky as the Board of Trustees may designate by regulation." 1962 Ky. Acts ch. 64, § 1, 252, 253.

The interpretation of "professional staff" in KRS 161.220(4)(a) and "professional staff members" in KRS 161.220(4)(c) were a consistent source of confusion. In OAG 65-629, we were asked to interpret "professional staff members" in KRS 161.220(4)(c), and advised that "the Legislature intended to extend coverage by the Teachers' Retirement System to those members of the teaching profession who have chosen to render their services directly to the State Department of Education as well as to those employed by a local board of education." We also addressed an administrative regulation promulgated by the Department of Education which "defines professional staff members for the purposes of Teacher Retirement as all employees in positions with a grade classification of 22 or above, and those employees in the Education Counselor-Examiner series, grade classification 21." *Id.* We advised that "such a standard based on job classification and grade is reasonable." *Id.*

In 1966, the KTRS Board of Trustees adopted a regulation requiring that in order to participate in KTRS, persons employed by local boards of education must be employed full time in public elementary or secondary education programs for which certification is required. BD. OF TRS. OF THE TEACHERS' RET. SYS. MINUTES Ex. VII (Sept. 28, 1966).

In OAG 66-747, SSA asked this office to interpret the phrase "professional staff members" in KRS 161.220(4)(c). We looked to the history of the statute, which initially included all employees "appointed in accordance with KRS 156.140," until its repeal as part of the state merit act. We noted that "the original intent of the General Assembly was to include within the Teachers' Retirement

System . . . those professional staff members," and that "the General Assembly was trying to express its intention that a distinction be made between those positions of responsibility involving some professional skill and judgment and those positions which may ordinarily be considered clerical, custodial, and the like." *Id.* We concluded that KRS 161.220(4)(c) "includes (a) all positions within the Department for which certification is or may be required as a condition of employment, and (b) all positions which are or have been filled by the Superintendent of Public instruction subject to the approval of the State Board of Education." *Id.* After reviewing OAG 66-747, SSA indicated its concurrence. Letter from Ray L. Colyer, Dist. Manager, Soc. Sec. Admin., to Murray Biegalle, Director, Div. of Pers. Sec., Dep't of Econ. Sec. (Jan. 11, 1967).

In OAG 67-232, we further clarified the rationale in OAG 66-747 that "in the absence of an express definition by the General Assembly . . . , no one is in a better position to determine whether a particular employment in the Department of Education is a 'professional staff member' than the Superintendent of Public Instruction and the State Board of Education." We concluded that "the Superintendent may submit to the State Board for its approval, and the State Board may approve or reject, those positions about which some doubt exists but the Superintendent believes are 'professional staff members.'" *Id.* After reviewing OAG 67-232, SSA again indicated its concurrence. Letter from M.D. Dewberry, Reg. Assistant Comm'r, Soc. Sec. Admin., to Murray L. Biegalle, Dir., Div. of Pers. Sec. (Jan. 30, 1968).

In 1968, the General Assembly amended KRS 161.220(4)(c) to provide "the Superintendent of Public Instruction, Assistant Superintendents, and the division heads; staff members of the State Department of Education employed in positions for which certification by the certification agency of the Department is required as a condition of employment." 1968 Ky. Acts ch. 136, § 1, 417, 418.

In OAG 69-355, we were asked to opine on "the Social Security Status, if any, of the Executive Secretary, Assistant Executive Secretary, the Senior Accountant, and the Administrative Officer of the Teachers' Retirement System." At the time of Kentucky's Section 218 Agreement in 1951, "the position of the Executive Secretary and the position of the Assistant Executive Secretary of the Teachers' Retirement System were then both covered by the Teachers' Retirement System." *Id.* However, "the position of Administrative Officer and Senior

Accountant . . . were not in existence in 1951 but were later created, and upon their creation, the Board of Trustees . . . required that the person employed in those positions be covered by the Teachers' Retirement System." *Id.* We advised that the Secretary and Assistant Executive Secretary were both exempted from social security participation as members in 1951. Regarding the Senior Accountant and Administrative Officer, we advised that "these positions were created subsequent to a regulation adopted and official action taken by the Board of Trustees which designated . . . that they be covered by the Teachers' Retirement System." *Id.* We concluded that "none of the above positions are subject to or eligible for participation in the Social Security program." *Id.*

On January 20, 1970, the Social Security Administration issued a memorandum addressing the issues raised in OAG 69-355. The Social Security Administration stated that "the Attorney General's opinion remains the most reliable interpretation available regarding the pertinent Kentucky statutes" and "is a reasonable interpretation of State law and should be accepted." Memorandum from Philip T. Brown, Reg'l Att'y, Soc. Sec. Admin., to Ray Colyer, Dist. Manager, Soc. Sec. Admin. 3-4 (Jan. 20, 1970). The memorandum further stated that:

The eligibility for coverage under a Section 218 Agreement of services performed in a position created or reclassified after the agreement is made applicable to a coverage group is determined on the basis of whether the position would have been covered under the local system if the position had been in existence on the date the agreement was made applicable to the coverage group.

Id. at 4. Based on the memorandum, the application of the Section 218 Agreement to new or reclassified positions is determined by whether the position would have been covered at the time of the Section 218 Agreement.

In 1971, the KTRS Board of Trustees promulgated another regulation that in order to be eligible for KTRS participation, persons employed by local board of education must be employed full-time in the public elementary or secondary education programs in a position for which certification is required, with the addition that teachers of adult education were also included. BD. OF TRS. OF THE TEACHERS' RET. SYS. MINUTES Ex. XI (June 28, 1971).

In 1974, the definition of "teacher" in KRS 161.220(4) was amended to provide that "teacher" means "any regular or special teacher, supervisor or administrator occupying a position requiring certification by the State Department of Education, or a professional level of training, as a condition of employment." 1974 Ky. Acts ch. 395, §1, 808, 808. We addressed the interpretation of "professional level of training" in OAG 85-133. We advised that KTRS Board of Trustees "has for a number of years defined 'professional level of training' to mean graduation from a recognized college or university or its equivalent. It is the opinion of this office that such definition is reasonable and consistent with the statutory responsibilities of the Board." *Id.*

In 1986, in order to definitively resolve the question of "professional level of training," the definition of "teacher" in KRS 161.220(4) was amended again to mean "any regular or special teacher, or professional employee occupying a position requiring certification by the state department of education or graduation from a four (4) year college or university, as a condition of employment." 1986 Ky. Acts ch. 439, § 1, 1147, 1147.

C. Internal Revenue Service and Social Security Administration Inquiries

In 2010, the Federal State and Local Government division of the IRS sent an inquiry to Kentucky's Division of Local Government Services in the Finance and Administration Cabinet ("DLGS"). The IRS asserted that KTRS membership initially included only certified positions, and did not include other positions requiring graduation from a four year college or university until the 1986 amendment. DLGS responded on May 10, 2010, providing an overview of the history of the interpretation of "teacher" and inclusion in KTRS. Letter from James Driver, Ass't Dir., Ky. Div. of Local Gov't Servs., to Dan Wiseman & Joe Burke, IRS Fed. State & Local Gov't (May 10, 2010). DLGS stated that "rather than expand membership, the purpose of the 1986 law change was to add a concrete requirement that could be uniformly applied across the State. That change was not made to expand coverage, but to clearly prescribe the requirements for coverage." *Id.* at 2.

On July 11, 2014, SSA sent a letter to Mr. Bryan, State Social Security Program Administrator, at the request of the IRS, which is at issue in this request. Letter from Kirk S. Jockell, State & Local Section 218 Coordinator, Soc. Sec.

Admin., to J.W. Bryan, State Soc. Sec. Admin. (July 11, 2014) ("IRS Letter"). SSA generally stated that "IRS asked [SSA] to determine whether amendments to Kentucky's definition of 'teacher' expanded retirement system coverage to include positions in the Kentucky public elementary and secondary schools, Kentucky State Department of Education, and [KTRS] . . . that were previously covered as absolute coverage positions." Specifically, SSA requested an opinion on the following issues:

1. Please ask the Kentucky Attorney General (Attorney General) to consider Ky. Op. Atty. Gen. No. 65-629 (August 25, 1965), and Ky. Op. Atty. Gen. No. 66-747 (December 8, 1966), defining professional staff members as related to the Kentucky State Department of Education, and advise whether they agree with the previous findings. Also, ask the Attorney General to specifically address IRS' concerns regarding noncertified, and non-teaching professional positions as related to the 1962 and the 1968 amendments and the September 28, 1966, and June 28, 1971, KTRS Board of Trustee's Minutes.
2. Please ask the Attorney General to consider Ky. Op. Atty. Gen. No. 69-355 (July 2, 1969), addressing Section 218 Coverage for KTRS positions and advise whether they agree with the previous findings. Also, ask the Attorney General to specifically address IRS' concerns regarding KTRS positions and the Board of Trustees' ability to designate KTRS membership by regulation, as discussed in the 1962 amendment.
3. Please ask the Attorney General to consider Ky. Op. Atty. Gen. No. 85-133 (October 23, 1985), defining professional level of training as related to participation in KTRS, and advise whether they agree with the previous findings.
4. Please request a legal opinion from the Attorney General addressing Section 218 coverage for the Kentucky public elementary and secondary schools, following the 1986 legislative amendment to the definition of "teacher." . . . Specifically, whether the amendment expanded retirement coverage to the Kentucky public elementary and secondary schools, as alleged by IRS.

Analysis

1. OAG 65-629 and 66-747, 1962 and 1968 Amendments to KRS 161.220(4)(c), and 1966 and 1971 Board of Trustees' Minutes

IRS generally argues that at the time of the Section 218 Agreement, KTRS membership "was limited to teaching professionals and did not include other professional staff." In OAG 65-629, we advised that the Department of Education's policy of treating all persons with a grade classification of 22 or above as members of KTRS was reasonable. This standard by its terms did not limit KTRS membership to certified positions, but included all professional staff with a grade classification of 22 or above. In OAG 66-747, we expressly advised that KTRS membership included all positions "for which certification is or may be required," and all positions "filled by the Superintendent of Public instruction subject to the approval of the State Board of Education." In both OAG 65-629 and OAG 66-747, we consistently advised that KTRS membership was not limited solely to certified positions, but included other professional staff members which did not necessarily require certification, and we continue to agree with those findings.

IRS further asserts that "based upon the 1962 and 1968 amendments and the KTRS Board of Trustees' Minutes dated September 28, 1966, and June 28, 1971, . . . KTRS membership for the Kentucky State Department of Education was limited to positions that required certification from the State Department of Education." In support, IRS cites to the September 28, 1966 and June 28, 1971 minutes of the KTRS Board of Trustees. The 1962 amendment was a necessary amendment in response to the adoption of the state merit system act, which repealed KRS 156.140. In its place, the amendment added a section to include in KTRS "such members of the administrative staff of the Teachers' Retirement System . . . as the Board of Trustees may designate by regulation." 1962 Ky. Acts ch. 64, § 1, 252, 253. Prior to the adoption of the state merit act, the Department of Education had the statutory authority to designate professional staff members for participation in KTRS under KRS 156.140. When that statute was repealed, it was replaced by delegating the authority to designate by regulation which professional staff members participate in KTRS to the Department of Education. Both prior to and after the 1962 amendment, the Department of Education had the authority to designate professional staff members for participation in KTRS.

The 1962 amendment was not a substantive change in coverage for KTRS; rather, it was merely a formality required by the adoption of the state merit act and the repeal of KRS 156.140. Similarly, after the 1968 amendment, the Board of Trustees still had the authority to designate KTRS participation by regulation. The intent to include certain professional staff members in KTRS was present at the inception of Kentucky's Section 218 Agreement, and persisted throughout the 1962 and 1968 amendments to KRS 156.140, and the accompanying regulations promulgated by the KTRS Board of Trustees.

2. OAG 69-355 and the Ability of the Department of Education to Designate KTRS Membership by Regulation

In OAG 69-355, we advised that the positions of Executive Secretary and Assistant Executive Secretary were included in KTRS because they were members in 1951, and that the Senior Accountant and Administrative Officer of the Teachers' Retirement System were included in KTRS because the Department of Education had designated them to be included under KRS 161.220(4)(c). At the time of Kentucky's Section 218 Agreement in 1951, the Executive Secretary and Assistant Executive Secretary were both included in KTRS. The positions of Administrative Officer and Senior Accountant were not in existence in 1951, but were later created by regulation and included in KTRS. We therefore advised that the Executive Secretary and Assistant Executive Secretary were included in KTRS at the time of Kentucky's Section 218 Agreement, and that the Administrative Officer and Senior Accountant were included in KTRS by regulation. This position was confirmed by the 1970 memorandum from the Social Security administration, and the Attorney General continues to stand by that position.

IRS appears to admit that "the KTRS Secretary and Assistant Secretary should be excluded from Section 218 coverage." IRS Letter. IRS further states that "in 1962, Kentucky defined 'teacher,' for KTRS purposes, to include '[s]uch members of the administrative staff of the Teachers' Retirement System . . . as the Board of Trustees may designate by regulation." *Id.* The Board of Trustees designated that the Administrative Officer and Senior Accountant were included in KTRS by regulation. The Attorney General thus does not see any disagreement between the IRS and the position expressed in OAG 69-355, nor any disagreement over the ability of the Board of Trustees to designate KTRS membership, which it was given in 1962.

IRS does further contend that "all other KTRS positions were absolute coverage positions, including newly created positions that did not require a teacher designation, and these positions are subject to Social Security taxes." The Attorney General does dispute that contention based on the 1970 memorandum from the Social Security administration stating that coverage for newly created positions is determined by whether those positions would have been included at the time of the Section 218 Agreement had they existed. Coverage under Kentucky's Section 218 Agreement has not been limited only to certified teachers since its inception, as it has consistently included positions requiring a professional level of education but not certification.

3. OAG 85-133 and Professional Level of Training

In OAG 85-133, we addressed the interpretation of "professional level of training" in KRS 161.220(4). We noted that "KRS 161.220(4) does not specifically define 'professional level of training,'" and that the Board of Trustees "has for a number of years defined 'professional level of training' to mean graduation from a recognized college or university or its equivalent." *Id.* We concurred in that interpretation. IRS does not appear to directly question that interpretation in its letter, and we maintain that the interpretation of "professional level of training" was a reasonable interpretation of KRS 161.220(4) at the time.

4. 1986 Amendment and Alleged Expansion of Coverage

In 1986, the definition of "teacher" in KRS 161.220(4) was amended to strike "professional level of training" and replace it with "professional employee" requiring "graduation from a four (4) year college or university." IRS argues that the "1986 amendment expanded KTRS membership requirements to include any regular or special teacher, or professional employee occupying a position requiring graduation from a four-year college or university." However, as explained in detail above, KTRS membership has consistently been extended to professional staff members for whom certification is not required since the inception of Kentucky's Section 218 Agreement. The 1986 amendment was intended to provide a definitive codification of what was the consistent and prevailing, if not entirely uniform, application of Kentucky's Section 218 Agreement to professional education positions. Rather than expand KTRS membership requirements, the 1986 amendment confirmed KTRS practice, and definitively

resolved the question of what constituted "professional" employees. Accordingly, the 1986 amendment to KRS 161.220(4), instead of expanding KTRS coverage, merely clarified and ratified existing historical practice towards professional education employees.

Conclusion

In summary, despite the changes in terminology regarding professional education staff for whom certification is not required, those meeting the criteria for a professional level of education have been included in KTRS since the inception of Kentucky's Section 218 Agreement. While there has been some uncertainty as to which employees constituted professional staff members, which was definitively resolved by the 1986 amendment to KTRS 161.220(4), professional staff for which certification is not required have consistently been included in KTRS. Further, for those professional positions which were not in existence at the time of Kentucky's Section 218 Agreement, we advise that they would have been included had they existed at the time of Kentucky's Section 218 Agreement, in accordance with SSA's own guidance. We continue to agree with our previous interpretations of the prior versions of KRS 161.220(4), and maintain that school system positions requiring a professional level of education are exempt from Social Security participation under Kentucky's Section 218 Agreement as participants in KTRS.

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